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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

KEDRICK LEE JOHNSON,

Defendant and Appellant.

C086541

(Super. Ct. No. 17FE017042)

A jury found defendant Kedrick Lee Johnson guilty of felony domestic violence. In a bifurcated proceeding, the trial court found true the allegation defendant had a prior conviction that qualified as a strike under California's three strikes law.

On appeal, defendant contends there was insufficient evidence to support the trial court's strike finding. We agree and reverse the judgment as to that finding and remand for further proceedings. In all other respects, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

The prosecution alleged defendant was previously convicted of a serious or violent felony, assault with a deadly weapon. As evidence of this strike conviction, the prosecution presented certified copies of the record of defendant's 2005 conviction. Count one of the information from the 2005 conviction alleged: "defendant(s) KEDRICK LEE JOHNSON did commit a felony namely: a violation of Section 245(a)(1) of the Penal Code of the State of California, in that said defendant did willfully and unlawfully commit an assault . . . with a deadly weapon, to wit, a knife, and by means of force likely to produce great bodily injury. [¶] 'NOTICE: The above offense is a serious felony within the meaning of Penal Code Section 1192.7(c)(23) in that the defendant(s) personally used a dangerous and deadly weapon.' " Defendant pled no contest to that count.

Also included in the record of conviction were several minute orders documenting the proceedings. A document entitled, "Minute Order – Plea" stated defendant pled no contest to "Ct 1 PC 245(a)(1) prom: 4 mos CJ, S/T." The "Minute Order & Order of Probation" stated the statute of conviction: "PC 245(A)(1) FEL." And the "Minute Order – Header/Proceedings" contained a handwritten notation from the date of the change of plea hearing: "[Defendant] advised that plea to offense constitutes a future strike."

The trial court found defendant's 2005 conviction was a "strike prior." Based on that finding, the trial court doubled defendant's two-year sentence to four years in prison.

## DISCUSSION

Defendant argues there was insufficient evidence to sustain the prior serious felony allegation. We agree.

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<sup>1</sup> We dispense with a more detailed recitation of the facts underlying defendant's conviction as it is immaterial to our resolution of the issue on appeal.

For a prior conviction to qualify as a strike, the prosecution must prove the serious or violent nature of the offense beyond a reasonable doubt. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) “Where . . . the mere fact that a prior conviction occurred under a specified statute does not prove the serious felony allegation, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue.” (*Ibid.*) “[I]f the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense.” (*Id.* at p. 1066.) “‘[The] trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction . . . .’” (*Ibid.*)

In 2005, defendant pled no contest to a violation of Penal Code<sup>2</sup> section 245, subdivision (a)(1) (section 245(a)(1)), which at the time described two ways of committing aggravated assault within the same subdivision: (1) by use of a deadly weapon or instrument, or (2) by means of force likely to produce great bodily injury.<sup>3</sup> Of these, only assault with a deadly weapon is a serious felony constituting a strike under the three strikes law. (§§ 1192.7, subd. (c)(31), 667, subd. (d)(1), 1170.12, subd. (b)(1).) “Accordingly, the mere fact of a conviction for aggravated assault under former section [245(a)(1)] would be insufficient to establish the prior conviction was a strike in any case in which the verdict or plea did not specify the precise means used to commit the offense.” (*People v. Learnard* (2016) 4 Cal.App.5th 1117, 1122.)

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<sup>2</sup> Further undesignated statutory references are to the Penal Code.

<sup>3</sup> In 2012, the Legislature amended section 245 by deleting the phrase “or by any means of force likely to produce great bodily injury” from subdivision (a)(1) and placing it in newly enacted subdivision (a)(4). (Stats. 2011, ch. 183, § 1.) Thus, the current version of the statute separates the two ways in which an aggravated assault can occur.

“On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt.” (*People v. Delgado, supra*, 43 Cal.4th at p. 1067.)

No document in the certified record of defendant’s 2005 conviction proves he pled to assault with a deadly weapon and not assault by means of force likely to produce great bodily injury. Two minute orders described the 2005 conviction as “PC 245(a)(1)” and “PC 245(A)(1) FEL,” which presumably refer to section 245(a)(1). As those notations refer only to the statute and not to the underlying factual basis for the conviction, they are insufficient to establish the conviction as a serious felony. (See *People v. Learnard, supra*, 4 Cal.App.5th at p. 1122.)

The information was also ambiguous as to the factual basis for the conviction. The count to which defendant eventually pled no contest charged him with committing “a violation of Section 245(a)(1) of the Penal Code of the State of California, in that said defendant did willfully and unlawfully commit an assault . . . with a deadly weapon, to wit, a knife, and by means of force likely to produce great bodily injury.” Since the information charged defendant with both assault with a deadly weapon *and* assault by means of force likely to produce great bodily injury, the information does not specify the underlying factual basis for the conviction. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1031 [the “ ‘force likely’ ” clause is an *alternative* to the “ ‘deadly weapon’ ” clause].)

The only evidence suggesting defendant pled to assault with a deadly weapon was a handwritten notation in the “Minute Order – Header/Proceedings” stating, “[defendant] advised that plea to offense constitutes a future strike.” In finding that notation sufficient

to sustain a strike finding, the trial court necessarily inferred the 2005 trial court made factual findings regarding the nature of the underlying offense and then advised defendant of the collateral consequences of the conviction. But, while the trial court was permitted to draw reasonable inferences from certified records (*People v. Delgado, supra*, 43 Cal.4th at p. 1066), we conclude the notation is not substantial evidence that defendant's 2005 conviction constitutes a strike.

In *Delgado*, our Supreme Court concluded a notation on the abstract of judgment “ ‘Asslt w DWpn’ ” -- which the parties agreed stood for “ ‘assault with a deadly weapon’ ” -- was substantial evidence of the factual basis for the conviction under former section 245(a)(1). (*People v. Delgado, supra*, 43 Cal.4th at p. 1069.) The court observed the abstract of judgment tracked only one of the two forms of assault set forth in the statute. (*Ibid.*) The court observed, “the abstract [of judgment] is a contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence. It may serve as the order committing the defendant to prison (§ 1213), and is ‘ “the process and authority for carrying the judgment and sentence into effect.” [Citations.]’ [Citations.] As such, ‘the Legislature intended [it] to [accurately] summarize the judgment.’ [Citations.] When prepared by the court clerk, at or near the time of judgment, as part of his or her official duty, it is cloaked with a presumption of regularity and reliability.” (*Id.* at p. 1070.) Because the basis for conviction was clearly stated in the abstract of judgment, the court concluded the People had presented prima facie evidence the conviction was a serious felony. (*Ibid.*)

In contrast to the abstract of judgment notation at issue in *Delgado*, the 2005 trial court had no duty to advise defendant of enhanced punishment in a possible future prosecution. (*People v. Crosby* (1992) 3 Cal.App.4th 1352, 1355-1356.) Thus, while “[i]t is presumed that official duty has been regularly performed” (Evid. Code, § 664) and

“the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record and describing the prior conviction, is truthful and accurate” (*People v. Miles* (2008) 43 Cal.4th 1074, 1083), the 2005 trial court’s advisement to defendant was not part of the court’s official duty and, more importantly, did not describe the prior conviction. Because the advisement did not describe the conviction as an assault with a deadly weapon and did not summarize the court’s factual findings regarding the nature of the offense, these presumptions are inapplicable to this notation. The notation was not recorded on the abstract of judgment or any other order that could be considered an official record or summary of the conviction. And, the notation itself is partially cut off in the record, calling into question whether the notation is a complete and accurate record of the advisement.

On this record, we conclude the 2005 trial court’s advisement, without more, is not substantial evidence that defendant’s prior conviction was a strike. Accordingly, we shall remand the matter to the trial court for further proceedings. On remand, the parties will be allowed to present evidence to support their respective positions on the question of whether the defendant was convicted of assault with a deadly weapon. (See *People v. Barragan* (2004) 32 Cal.4th 236, 239 [retrial of a strike allegation after reversal for insufficient evidence is permissible].)

#### DISPOSITION

The finding that defendant’s prior section 245(a)(1) conviction was a serious felony within the meaning of the three strikes law is reversed, and the enhancement imposed for that prior conviction is stricken.

If the People elect to retry the strike allegation, the trial court shall resentence defendant following retrial. If, within 60 days after the remittitur issues from this court, the People have not filed and served an election to retry the strike allegation, the trial

court shall dismiss the strike allegation for the 2005 prior conviction and resentence defendant.

/s/  
Robie, Acting P. J.

We concur:

/s/  
Mauro, J.

/s/  
Hoch, J.